Not To Be Published:

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

BEVERLY J. WALLACE,

Plaintiff,

vs.

JO ANNE B. BARNHART,
Commissioner of Social Security,

Defendant.

No. C01-4108-MWB

ORDER REGARDING PLAINTIFF'S APPLICATION FOR ATTORNEY FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Plaintiff's attorney has filed a motion seeking an award of attorney fees pursuant to the Social Security Act, 42 U.S.C. § 406(b). Plaintiff's attorney seeks an award of $7,872.50.[1] In response, the Commissioner states that only $6,524.25 was withheld from plaintiff's past-due benefits for potential attorney fees. Further, the Commissioner opposes plaintiff's attorney being compensated for time spent on clerical tasks, preparation of the fee petition and for time spent at the administrative level. The Commissioner asserts that plaintiff's attorney be awarded fees only for those services performed before the court.

Attorney fees in Social Security cases are bifurcated into two categories: time before the Agency and time before the courts. 42 U.S.C. § 406 (a)-(b). Plaintiff's attorney cannot request an award of attorney fees from the court for hours spent before the Agency.

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[1] As noted by the Commissioner in her Reply, plaintiff's attorney filed a copy of Wallace's Supplemental Security Income Notice of Award which was not responsive to the court's order. The court is only authorized to award fees from a claimant's past due Title II benefits. Therefore, the court required Wallace's Title II Notice of Award to be filed which provides the calculation of twenty-five percent of past due benefits being held for attorney fees. The amount provided to the court by plaintiff's attorney is incorrect.

Id. As set out in §§ 406(a) and (b), the statute deals with the administrative and judicial review stages discretely. Administrative representation is governed by § 406(a). Proceedings in court were addressed separately by Congress providing for fees when there is "a judgment favorable to a claimant." 42 U.S.C. § 406(b)(1)(A). The statute provides that the fee must be reasonable, not to, in any case, exceed twenty-five percent of the awarded past-due benefits. Similarly, plaintiff's attorney may petition the Commissioner for an award of attorney fees in connection with the attorney's services in proceedings before the Commissioner. 42 U.S.C. § 406(a)(2)(A).

The record does not indicate that plaintiff's attorney has applied to the Commissioner for an award of fees for the work performed during administrative proceedings; and the Agency has the power to make such an award, not the court. The longstanding precedent in this circuit and nationally indicates that the Commissioner has exclusive jurisdiction to determine attorney fees for services rendered before the Agency. This court can only exercise that jurisdiction which is conferred by the Constitution or Congress and, therefore, cannot award plaintiff's attorney a fee based on her services before the Social Security Administration. Having determined that this court cannot award fees for work performed before the Agency, this court will now consider whether the contingent fee agreement of twenty-five percent of the past-due benefits held, for work performed before this court, is reasonable.

After successfully representing a claimant in a Social Security case, an attorney may seek an award of attorney fees under the EAJA or pursuant to 42 U.S.C. § 406(b), and sometimes an attorney seeks fees under both. In this case, plaintiff's attorney has already been awarded $3,859.75 under the EAJA. Now plaintiff's attorney asks this court to award fees pursuant § 406(b).

Prior to 1965, attorneys representing Social Security claimants could claim as much

as fifty percent of past-due benefits awarded. Congress, in an attempt to protect claimants from inordinately large fees, and in a desire to ensure that attorneys representing successful claimants would not risk nonpayment of attorney fees, designed § 406(b) to control, not displace, fee agreements between claimants and their attorneys. *Gisbrecht v. Barnhart*, 535 U.S. 789, 793 (2002). The statute does so by imposing a limit of twenty-five percent of past-due benefits on attorney fees and by requiring that federal courts assure that the amount of fees to be paid within that limitation remains "reasonable."[2] There is nothing in the text or history of § 406(b) designed to prohibit or discourage attorneys and claimants from entering into contingent-fee agreements. However, when calculating fees pursuant to § 406(b), a number of circuits, the Eighth Circuit included, have held that such fees must be calculated by means of the "lodestar methodology"[3] and that the contingency fee agreement between the claimant and attorney is not the starting point for a court's

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[2] In pertinent part 42 U.S.C. § 406(b)(1)(A) states:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Commissioner of Social Security may . . . certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits.

42 U.S.C. § 406(b)(1)(A).

[3] Attorney fees under the "lodestar" method are calculated by taking the number of hours reasonably devoted to each case multiplied by a reasonable hourly fee.

determination of reasonable fees.[4] *Cotter v. Bowen*, 879 F.2d 359 (8th Cir. 1989). This is no longer the case. The issue in the *Gisbrecht* case was, "What is the appropriate starting point for judicial determination of "a reasonable fee for representation before the court?" 535 U.S. 789 at 792. The Supreme Court of the United States found that in formulating § 406(b), Congress provided for "a reasonable fee, not in excess of 25 percent of accrued benefits," as part of the court's judgment and the Court further stated:

> It is also unlikely that Congress, legislating in 1965, and providing for a contingent fee tied to a 25 percent of past-due benefits boundary, intended to install a lodestar method courts did not develop until some years later.
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> . . .
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> Most plausibly read, we conclude, § 406(b) does not displace contingent-fee agreements as the primary means by which fees are set for successfully representing Social Security benefits claimants in court. Rather, § 406(b) calls for court review of such arrangements as an independent check, to assure that they yield reasonable results in particular cases.

Gisbrecht, 535 U.S. at 807. Therefore, a court reviewing an application for fees under § 406(b) must first look to the contingent-fee agreement to determine whether it is within the twenty-five percent boundary. *Id.* at 808. After the court has reviewed the agreement it must then consider whether the amount of attorney fees to be paid is reasonable. *Id.* at 809. In *Gisbrecht*, the Supreme Court held that § 406(b) does not prevent the enforcement

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[4] As courts in the Eighth Circuit have frequently observed, "A contingency fee is not even the starting point of the court's determination of a reasonable fee; rather the Eighth Circuit employs the 'lodestar' approach, 'under which the number of hours reasonably worked on a case are multiplied by a reasonable hourly rate, and the product, or 'lodestar' may be further enhanced to reach a 'reasonable fee' based upon the specific facts of each case." *McDonald v. Apfel*, 2000 WL 744115 *1 (W.D. Mo. June 8, 2000) (*citing Cotter v. Bowen,* 879 F.2d 359, 363 (8th Cir. 1989)).

of contingent-fee agreements in Social Security cases. 535 U.S. at 789. However, district courts must review these agreements to assure that the fees generated by such agreements satisfy the statutory requirement of producing reasonable fees. *Id.*

In addition, the Supreme Court provided some examples of factors to consider when determining if attorney fees are reasonable. When considering contingency-fee agreements, appropriate reductions of attorney fees have been based on the character of the representation and the results achieved. *Id.* at 808. If the attorney is responsible for delay, a reduction is in order so the attorney does not profit from the accumulation of benefits during the delay. *Id.* Another acceptable justification for reduction is if a windfall to the attorney would occur because the benefits are large in comparison to the amount of time plaintiff's attorney spent on the case. *Id.* Further, "a court may require the plaintiff's attorney to submit, not as a basis for satellite litigation, but as an aid to the court's assessment of the reasonableness of the fee yielded by the fee agreement, a record of the hours spent representing the claimant and a statement of the lawyer's normal hours billing charge for noncontingent-fee cases." *Id.*

First, the court must determine if the written fee agreement meets § 406(b)(1) guidelines. Here the plaintiff entered into a contingent-fee agreement dated April 14, 1998. The agreement provided that if plaintiff's claim was appealed to the Appeals Council or to Federal Court that she would agree to pay twenty-five percent of all past due benefits. The Commissioner initially denied the plaintiff's claim for benefits. On November 1, 2001, the plaintiff appealed to this court and filed her complaint. By order dated October 25, 2002, plaintiff's case was remanded to the Commissioner solely for the calculation of benefits. The fee agreement states that plaintiff's attorney is entitled to receive twenty-five percent of any accrued Social Security disability benefits awarded to the client. The Notice of Award from the Agency states:

> Your lawyer may ask the court to approve a fee no larger than 25 percent of past due benefits. Past due benefits are those payable through September 2002, the month before the court's decision. For this reason, we are withholding $6,524.25.

The court finds that the written fee agreement in this case falls within the statutory guidelines of not exceeding twenty-five percent of the past-due benefits.

Second, under *Gisbrecht*, the court must review contingent-fee agreements, such as this one, "to assure that they yield reasonable results in particular cases." 535 U.S. at 807. The court must determine whether plaintiff's attorney's requested fee is reasonable compensation for her time spent in connection with judicial proceedings. Plaintiff's attorney bears the burden of demonstrating that her requested fee is reasonable under the circumstances. *Gisbrecht*, 535 U.S. at 808.

As an aid to the court's assessment of the reasonableness of the fee yielded by the fee agreement, a record of the hours spent representing the claimant and a statement of the plaintiff's attorney's normal hours billing charge for noncontingent-fee cases can be considered. On November 4, 2002, plaintiff's attorney applied for fees pursuant to 42 U.S.C. § 406(b) and submitted an exhibit requesting an hourly fee of $175.00 for 45 hours of attorney time and an hourly rate of $75.00 for 6.25 hours of paralegal time. (Doc. No. 17). On December 30, 2002, plaintiff's attorney submitted an exhibit in support of her request for fees pursuant to the EAJA requesting an hourly rate of $144.44 per hour for 29.50 hours of attorney time and an hourly rate of $70.00 for 2.75 hours of paralegal time. Plaintiff's attorney jointly agreed with the Commissioner to an award of attorney fees pursuant to the EAJA in the amount of $3,859.75. Now, plaintiff's attorney asserts that she should be paid $7,872.50. As previously noted, the Notice of Award received by the claimant, Wallace, provided that twenty-five percent of her past due benefits were being withheld to pay for attorney fees or $6,524.25.

When considering a fee award, the court must balance two important policy concerns. On one hand, fee awards should be substantial enough to encourage attorneys to accept Social Security cases — particularly when the attorney faces a risk of nonpayment. "If remuneration is insufficient, then deserving claimants will be unable to find counsel." *McDonald v. Apfel*, 2000 WL 744115 *1 (W.D. Mo. 2000). On the other hand, attorneys representing disabled claimants have a duty to protect the claimant's disability award. Attorney fees awarded under § 406(b) are deducted from the claimant's disability award. The duty of attorneys to protect the interests of their clients remains throughout all of the legal proceedings and, as such, plaintiffs' attorneys are obligated to pursue fees pursuant to the EAJA or provide to the court why such fees are not being pursued. *See Shepard*, 981 F. Supp. at 1192-94.

In the past, the courts would consider certain factors supporting a substantial fee, such as: the amount of attorney time spent on plaintiff's case, the complexity of the issues involved, the manner in which plaintiff's attorney analyzed and dealt with the issues, the diligence with which plaintiff's attorney undertook claimant's case, and in general the overall contribution of plaintiff's attorney to the decision reached by the court. *See Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983) (providing the factors to be considered by the courts when determining reasonable fees); *See also Cotter,* 879 F.2d at 363 n.5 (listing relevant factors). However, these factors were applied by courts utilizing the "lodestar" method to assist in determining whether the hourly rate should be enhanced based on the circumstances of a case.

The "lodestar" method is no longer to be applied to § 406(b) attorney fees applications. Though courts will consider many factors when testing the reasonableness of the contingency-fee agreement, the courts should consider the existence of a contingency agreement first and foremost since it manifests the attorney's willingness to take the case

despite the risk of never being paid and the plaintiff's agreement to such terms.

In this case there is a contingency-fee agreement in which the plaintiff has agreed to pay her attorney twenty-five percent of past-due benefits. The Commissioner does not object to fees pursuant to § 406(b). However, the Commissioner urges that the fee should be reasonable. The court has reviewed plaintiff's attorney's time at the judicial stage which amounts to 26.25[5] hours (Doc. No. 17). If 26.25 hours is calculated by $144.44 per hour, plaintiff's attorney would be paid $3,791.55. However, calculating fees in this manner disregards the Supreme Court's decision in *Gisbrecht* that the contingency-fee agreement is not to be overridden or displaced; and, further, that approach applies nothing more than the "lodestar" method. 535 U.S. at 808. Instead, this court is required to consider whether twenty-five percent of past-due benefits is reasonable for plaintiff's attorney's representation before the court.[6]

This court will now assess the value of the attorney's services to the client based upon the court's consideration and observation of several factors. The complaint in this case was filed in 2001. Plaintiff's attorney achieved success for her client. The

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[5] The court has calculated the hours submitted by plaintiff's attorney and arrives at neither 45 hours nor 29.50 hours as provided by two different exhibits submitted to the court by plaintiff's attorney. The court can only award fees for attorney time before the court. The calculation of the attorney time before the court as indicated in plaintiff's "Exhibit A in Support of Motion for Determination of and Award of Attorney Fees under 42 U.S.C. § 406(b)", equals 26.25 hours. Plaintiff's attorney submitted 45 hours in Exhibit A but this included time before the Agency. The 29.50 hours submitted by plaintiff's attorney was part of plaintiff's attorney's request for fees pursuant to the EAJA not pursuant to § 406(b).

[6] If the court were to do nothing more than apply the "lodestar" method plus an increase to the hourly fee based on enhancement factors to § 406(b) fee applications, it would defeat the goals of § 406(b) and "reject the primacy of lawful attorney-client fee agreements." *Gisbrecht*, 535 U.S. at 793.

Commissioner initially denied plaintiff's claim and the plaintiff would have been unsuccessful without judicial proceedings. Due to the contingent-fee arrangement, the court must also account for plaintiff's attorney bearing the risk that she would not win an award for her client and thus would not be paid. No delay resulted from plaintiff's attorney's representation. The court acknowledges that plaintiff's attorney has a history of representing social security claimants. However, this court is concerned with the inconsistency of hours submitted and those hours calculated by the court for attorney time before the court. Further, although plaintiff's attorney claimed a fee of $4,453.48 under the EAJA, plaintiff's attorney agreed with the Commissioner that $3,859.75 was sufficient payment under the EAJA for her work and representation on this case. The court has reviewed the record[7] and has also considered that there is a contingency fee agreement involved. Balancing this court's duty to protect the claimant's disability award against awarding a fee that is substantial enough to encourage attorneys to accept Social Security cases, the court finds that a fee of $4,750.00 is a reasonable fee award for plaintiff's attorney's representation at the judicial review stage after consideration of the above factors. The court orders plaintiff's attorney to immediately refund the lesser amount of $3,859.75 awarded under the EAJA to the plaintiff.[8]

THEREFORE, plaintiff's Application for Attorney Fees is granted in the amount of $4,750.00, pursuant to 42 U.S.C. § 406(b) and plaintiff's attorney is ordered to refund

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[7] The court also notes that plaintiff's attorney claims 9.25 hours of attorney time for legal, medical and vocational research for a social security case that was neither complex nor unusual.

[8] On August 5, 1985, Congress amended § 206(b) of Pub. L. No. 99-80, §3, 99 Stat. 186 to prohibit attorney's from being paid twice for the same services under the EAJA and the Social Security Act. Plaintiffs' attorneys are required to refund to the plaintiff the lesser of the EAJA fees or the fees awarded pursuant to section 406(b).

to the plaintiff the smaller fee awarded to plaintiff's attorney pursuant to the EAJA in the amount of $3,859.75.

IT IS SO ORDERED.

DATED this 22nd day of April, 2004.

Mark W. Bennett

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA